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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Second Circuit.

BRIEF FOR PETITIONER LEV.

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	4
Statement	5
Summary of Argument	7
Argument:	
I. 18 U.S.C. § 3500 does not provide the exclusive procedure by which all statements and reports of government witnesses to government agents are discoverable. A report summarizing generally what a government witness stated to a government agent is discoverable under a decision of this Court and under the Federal Rules of Criminal Procedure	10
A. The Express Language of the Statute	10
B. Legislative Intent	11
C. Discoverability of the Carlin Statement	13
II. A government agent's summary of what a government witness told him is discoverable under 18 U.S.C. § 3500	15
III. An *in camera* examination of a sealed statement or report not claimed to be irrelevant and related affidavits *dehors* the record is not authorized and deprives petitioner of his constitutional rights	18
IV. 18 U.S.C. § 3500 is unconstitutional in that it is in contravention of Article III and the Fifth Amendment of the Constitution	20
Conclusion	22

PAGE

Table Of Cases.

Alford v. United States, 282 U.S. 687 (1931) 20
Fryer v. United States, 207 F. 2d 134 (C.A.D.C. 1953) 15
Jencks v. United States, 353 U.S. 657 (1957) 6, 7, 8, 10, 14, 15, 17, 18, 19, 20
Lindsey v. United States, 133 F. 2d 368 (C.A.D.C., 1942) 20
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 21
United States v. Douglas, 155 F. 2d 894 (C.A. 7, 1946) 20
United States v. Miller, 248 F. 2d 163 (C.A. 2, 1957) ..18, 19
United States v. Peace, 16 F.R.D. 623 (D.C.N.Y., 1954) 15
United States v. Waldman, 159 F. Supp. 747 (D.C. N.J., 1958) 17, 19

United States Constitution and Statutes.

United States Constitution, Article III 2, 9, 21
United States Constitution, Amendment V 2, 9, 20, 21
United States Constitution, Amendment VI 2, 9, 20
Title 18, United States Code, Section 371 ..... 2, 5
Title 18, United States Code, Section 3500 ....2, 3, 4, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 21

Miscellaneous.

7 Catholic University Law Review, 91 (1958) 10, 21
House Report No. 700, 85th Cong., 1st Sess. (1957) 17
Senate Reports Nos. 569, 981, 85th Cong. 1st Sess. 2 (1957) 17
67 Yale Law Journal 674 (1958) 10

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OPINION BELOW.

The opinion of the Court of Appeals for the Second Circuit (R. 80-86) is reported in 258 F.2d 9.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 11, 1958 (R. 87). The time for filing a petition for a writ of certiorari was extended by order of this Court on September 9, 1958 to October 10, 1958. The petition was filed on that date and was granted as to questions 5, 6 and 7 of the petition on December 8, 1958. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article III, Section 1 of the United States Constitution provides that:

> "1. The judicial Power of the United States shall be vested in one Supreme Court, * * *"

Amendment V to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

Amendment VI to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with witnesses against him; * * *"

18 U. S. C., § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C., § 3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States

to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may di-

rect, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

QUESTIONS PRESENTED.[1]

1. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of 18 U. S. C. § 3500, when no claim is made that it contained irrelevant or extraneous matter?

2. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of 18 U. S. C., § 3500?

3. Does 18 U. S. C. § 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

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[1] These questions were respectively 5, 6 and 7 in the petition for certiorari.

STATEMENT.

Petitioner was convicted with others by a jury sitting in the United States District Court for the Southern District of New York and sentenced to nine months imprisonment and to pay a fine of $5000 (R. 9, 10).

The conviction as to petitioner was upon the first count of an indictment which charged him and eight others, including one Rubin and one Ades, with conspiring to defraud the United States of its governmental functions of administration and procurement of governmental contracts free from partiality, obstruction, dishonesty and fraud and its right and interest in the conscientious and faithful services of certain employees of the New York Quartermaster Procurement Agency and the Armed Services Textile and Apparel Procurement Agency free from corruption, dishonesty, bias, hope of unlawful reward and fraud in violation of 18 U.S.C. § 371. (R. 12)

As part of the conspiracy it was charged that petitioner Rubin[1] and Ades would offer and give money and other things of value to officers and employees acting on behalf of the Quartermaster Corps for the purpose of inducing them to 1) disclose confidential information prior to awarding of government contracts, 2) corruptly grant deviations in the specifications of government contracts and 3) influence their decisions on matters pending before them. (R. 13, 14)

In support of these allegations the government offered the testimony of one Carlin, an accountant, tending to demonstrate the commencement and form of the conspiracy charged (R. 21-73). Carlin testified to a number

[1] Rubin is a petitioner in this Court in No. 437.

of conversations (R. 27) among Rubin, Ades and one Levy, a partner of Ades but not a defendant, during the course of which Rubin stated that he could obtain government contracts for Levy and Ades because of his connections and intimate acquaintances in the Quartermaster Corps (R. 26, 28, 31, 64) and that about 5% of any contract price would be needed as expenses to take care of these people to return favors that might be extended to him there (R. 30, 55, 64). Carlin also testified that Rubin had stated that these connections would see that he was awarded contracts (R. 28, 31), that he could exercise some control over the selections of inspectors who would be assigned to examine the goods being manufactured (R. 38) and that he could get deviations from contract requirements if needed (R. 38, 39). He also testified to a check drawn by Ades and Levy in the amount of $1000 which Rubin told him was to pay for expenses incurred in the Quartermaster Corps. (R. 32, 33).

During the cross-examination and at its termination, the trial court was asked to direct the government to produce a statement which Carlin stated he believed he had signed, and which he said he had given to Balaban and Poole, Senate investigators, concerning the events to which he testified. (R. 45, 46). The trial court denied these requests on the grounds that no proper foundation showing inconsistency had been laid (R. 46, 74).

Upon appeal of this cause to the Court of Appeals for the Second Circuit petitioner contended that the trial court's ruling in this respect was reversible error. This contention was based on *Jencks* v. *United States*, 353 U.S. 657 (1957), which had been handed down by this Court after the termination of the trial below (R. 85).

The prosecutor at the trial thereupon presented to the court below a sealed envelope which according to two

affidavits accompanying it executed by the prosecutor and Balaban contained a report of an interview with Carlin by Balaban and Poole (R. 75-78). The Court below characterized it as a "summary of an interview" (R. 85). These affidavits were to the effect that the report or summary was the only written record made of Carlin's interview, was written after it occurred and that it summarized generally what Carlin related to Balaban (R. 75-78). No claim was made that it did not relate to the subject matter of Carlin's testimony.

The Court of Appeals after making an *in camera* examination of the contents of the sealed envelope and the two affidavits held that the refusal of the trial court to permit inspection by petitioner of a statement of this nature was error but harmless since it was merely a summary of an interview and therefore not available to petitioner on a new trial under the provisions of 18 U.S.C. § 3500. (R. 85, 86)

SUMMARY OF ARGUMENT.

I.

18 U.S.C. § 3500 does not provide the sole procedure by which all statements and reports made by government witnesses to government agents are discoverable.

That procedure is made applicable only to statements defined in Par. (e) which in turn does not relate to undefined statements and reports referred to in Par. (a) of the Statute. This is made clear from both the express language of the statute and the legislative intent underlying it.

Conceding, *arguendo,* that the statement here involved is not within Par. (e) of 18 U.S.C. § 3500 because it is a general summary of what the witness told the government agent rather than a substantially verbatim recital of what he said, nevertheless it is discoverable under *Jencks* v.

United States, 353 U.S. 657 (1957) and the Federal Rules of Criminal Procedure.

II.

The document here in question purports according to the court below to be a report made by a government agent summarizing generally what was stated to him by a government witness. Petitioner has never seen it.

The words "substantially verbatim recital of an oral statement made by said witness" as used in Par. (e) of 18 U.S.C. § 3500 do not necessarily exclude the report in the case at bar.

The true test is whether or not the agent's report contains the substance of what the witness told him. If it does, it is discoverable under 18 U.S.C. § 3500. This is made clear by judicial decision and the intent of Congress as shown by the legislative history of the Statute.

Further, since the intent of Congress was not to nullify but to clarify the *Jencks* decision and since the report is discoverable under that decision, the report is discoverable under the Statute.

III.

The *in camera* examination of the contents of a sealed envelope containing the government agent's report is not authorized by 18 U.S.C. § 3500 since no claim was made that the report did not relate to the subject matters of the witness's testimony.

Therefore, if the report is within the definition of Par. (e) of the Statute, it would be producible to petitioner in the event of a new trial without an *in camera* examination.

If the report is not within that definition, it is producible to petitioner under *Jencks* v. *United States*, 353 U.S. 657 (1957) without prior inspection *in camera* by the court.

Further, the consideration by the court below of affidavits relating to the report furnished it by the prosecutor *dehors* the record without affording petitioner the right to cross-examine denies him his constitutional rights under the 5th and 6th Amendments.

IV.

In any event, 18 U.S.C. § 3500 is unconstitutional in that it deprives defendants of due process of law. Due process of law requires that statements and reports of government witnesses to government agents be produced to the defense in the first instance because only the defense is adequately equipped to determine their effective use in discrediting witnesses.

The Statute is also unconstitutional because it constitutes an interference by the legislative branch of the government with the rule-making powers of this Court vested in it by Article III of the Constitution.

ARGUMENT.

I.

18 U.S.C. § 3500 DOES NOT PROVIDE THE EXCLUSIVE PROCEDURE BY WHICH ALL STATEMENTS AND REPORTS OF GOVERNMENT WITNESSES TO GOVERNMENT AGENTS ARE DISCOVERABLE. A REPORT SUMMARIZING GENERALLY WHAT A GOVERNMENT WITNESS STATED TO A GOVERNMENT AGENT IS DISCOVERABLE UNDER A DECISION OF THIS COURT AND UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The thrust of the decision below is to prevent discovery or production of any report or memorandum by government agents of interviews with government witnesses unless it falls within the statutory definition of a "statement" contained in 18 U. S. C. § 3500 (e).

Assuming, *arguendo*, that the court below was correct in its view that the Carlin statement was not within such definition, it is submitted, nevertheless, that it is still discoverable. The holding to the contrary contravenes the express language of the statute, violates the intent of Congress in enacting it, and conflicts with this Court's decision in *Jencks* v. *United States*, 353 U. S. 657 (1957) and with the Federal Rules of Criminal Procedure.

A. The Express Language of the Statute.

An examination of 18 U. S. C. § 3500 indicates that it is a hybrid consisting of two distinct and separate portions dealing in the first instance, Par. (a), with statements and reports generally and in the second instance, Par. (b)-(e), with specific types of statements.[1]

[1] For a discussion of the hasty manner in which Congress approached and passed the statute with virtually no hearings and limited debate, see 67 Yale Law Journal 674, 680-685, 7 Catholic University Law Review 91, 93-93.

As to the first portion, Par. (a), the statute provides no definition whatsoever of the statements and reports which are to be made available by subpoena, discovery or inspection. It does provide, however, that the production of such undefined statements and reports is postponed until the government witness has testified.

If the statute terminated at this point it would seem that the holding of *Jencks* was not affected by it. However, it does not there terminate and the second portion of the statute provides procedure by which certain specific statements, those defined in Par. (e), are to be produced.

It is evident that the second portion does not touch the first since the definitions in Par. (e) are made to relate solely to Pars. (b), (c) and (d) and not to Par. (a). This is further demonstrated by the fact that the word "statement" as used in Par. (b) is immediately qualified by the words "as *hereinafter* defined." As heretofore stated the terms "statement or report" set out in Par. (a) are undefined and the term "report" is never again used.

Since the statements and reports referred to in Par. (a) are thus insulated in the above manner from the procedures for discovery as set up by Pars. (b), (c) and (d), it follows that such statements and reports are not subject to the restrictions of those paragraphs. They may therefore be discoverable under other rules of court or procedure.

B. Legislative Intent.

The legislative history of 18 U. S. C. § 3500 also evidences the intent of Congress not to provide in it an exclusive procedure for discovery of all statements and reports of government witnesses.

The original legislation as drafted by the Justice Department and which it sought to have enacted was

presented to both the Senate and House and provided in Par. (a) that:

> "In any criminal prosecution brought by the United States, *any rule of court or procedure to the contrary notwithstanding,* no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpoena, discovery, or inspection, *except as provided in Par. (b)* of this section." 103 Cong. Rec.-Part 8, 19120, 10181. (Emphasis supplied.)

The House passed the bill in this identical form after limited debate. 103 Cong. Rec.-Part 12, 16130. However, the Senate made two changes (insofar as here pertinent) to the Justice Department draft of Par. (a). The first of these changed it to read as follows:

> "(a) In any criminal prosecution brought by the United States, no statement or report of a prospective witness which is in the possession of the United States shall be the subject of subpoena, discovery, or inspection, except as provided in the Federal Rules of Criminal Procedure, or as provided in Par. (b) of this section." 103 Cong. Rec.-Part 8, 10984.

The second changed the paragraph so as to make statements or reports discoverable, "*if* provided in the Federal Rules of Criminal Procedure or as provided in Par. (b) of this section." 103 Cong. Rec.-Part 12, 15799.

The debates indicate that among the reasons for the first change of Par. (a) was the desire of the Senate to make clear that it was not passing a statute which would repeal discovery under the Federal Rules of Criminal Procedure. 103 Cong. Rec.-Part 12, 15787.

The debates also make clear that the second change was based upon the thought that the Senate should not express any view at all as to whether the Federal Rules of Criminal Procedure were applicable to statements of witnesses. 103 Cong. Rec.-Part 12, 15791.

Thereafter the Senate and the House bills went to conference which finally reported out the bill as ultimately enacted. 103 Cong. Rec.-Part 12, 16486, 16737. As so enacted Par. (a) reads as follows:

> "In any criminal prosecution brought by the United States no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery or inspection until the witness has testified on direct examination in the trial of the case."

It thus appears that all references to "any rule of court or procedure to the contrary notwithstanding" and all restrictions on discovery "except as provided in Par. (b)" were eliminated as was the specific reference to the Federal Rules of Criminal Procedure. These changes make obvious that Congress completely rejected the Justice Department's effort to confine all discovery of statements and reports of witnesses to the procedure established in Par. (b), and liberalized the proposed legislation. This rejection demonstrates the intent of Congress that the statute not foreclose the discovery of those statements and reports beyond the narrow definition of Par. (e).

C. Discoverability of the Carlin Statement.

Since the statute by its express terms as well as by congressional intent does not limit discovery of all statements and reports of witnesses, it is submitted that the Carlin

statement is producible to petitioner in the event of a new trial under the authority of *Jencks* v. *United States*, 353 U. S. 657 (1957).

All of the requirements there laid down are met. Carlin had testified in chief and the statement was shown to relate to that testimony. The document was identified and clearly no fishing expedition is here involved (R. 45, 46). Neither the court below nor the government has ever asserted the contrary and no question of relevancy has ever been raised. The court below, in fact, stated in effect that but for the intervention of 18 U. S. C. § 3500, *Jencks* would require production of the Carlin statement to petitioner (R. 85).

Jencks is not limited to statements as defined in Par. (e). It dealt specifically with reports of witnesses in the possession of the government "written and, when orally made, as recorded by the F. B. I." 353 U. S. at 668. This Court did not indicate that such oral reports must be substantially verbatim and recorded simultaneously or that they could not be in summary.[1]

The underlying logic of the *Jencks* decision makes obvious that the Carlin memorandum is discoverable under it. This Court there held that "relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." 353 U.S. at 669. This in turn was based upon this Court's recognition, p. 667, that:

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[1] In fact, among the reports it there considered were some notes taken by the F.B.I. from the oral statements of the witness Ford. Sup. Ct. Rec. 164-166, 170, **Jencks v. United States**, No. 23, Oct. Term, 1956.

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Obviously a summary of a statement to a government agent may have the greatest value in establishing prior inconsistencies. The fact that such a summary might not be admissible in evidence is of no import, since this Court recognized the distinction in testing relevancy for discovery purposes as against relevancy for evidentiary use. 357 U.S. at 669.[1]

Finally, it appears that a number of courts have recognized that statements of witnesses are discoverable under the provisions of the Federal Rules of Criminal Procedure. *Fryer* v. *United States*, 207 F. 2d 134 (C.A. D.C., 1953); *United States* v. *Peace*, 16 F. R. D. 423 (S.D. N.Y., 1954).

II.

A GOVERNMENT AGENT'S SUMMARY OF WHAT A GOVERNMENT WITNESS TOLD HIM IS DISCOVERABLE UNDER 18 U.S.C. § 3500.

As heretofore pointed out, the contents of the sealed envelope subjected to the *in camera* examination of the court

[1] This comports with basic rules. Prior inconsistent statements are frequently shown by the hearer thereof, and there is no necessity that the evidence be in written form. It is the evidence of the court reporter that impeaches one testifying inconsistently to a prior statement made under oath in a recorded judicial proceeding—not the record of that proceeding.

below consisted of a memorandum prepared by a Senate investigator summarizing generally an interview with the witness Carlin (R. 85). Therefore, according to the court below, it was not a "substantially verbatim recital" of his statement. It is respectfully submitted that this is error.

In the first place, the words "substantially verbatim" and "summarizing generally" are not mutually exclusive. The former denotes something less than entirely word-for-word. On the other hand, the latter terms may still contain a large amount of the verbiage of the witness. The problem then remains as to how many words of the witness must be used to make a substantially verbatim recital. No standard is provided by the statute. However, its legislative history and judicial interpretation of the phrase "substantially verbatim" point unerringly to the conclusion that memoranda of the type before this Court fall within the statute.

The congressional intent in the above respect is evidenced by the statement of Senator O'Mahoney, in charge of the bill in the Senate, who stated, when it was being considered in its final form, that it "would include a memorandum made by an agent of the government of an oral statement made to him by a government witness." 103 Cong. Rec.—Part 12, 16488.

Further, the conference report tendered to the House indicated that the bill agreed upon conformed with the standards "enunciated by Judge Moore * * * in *United States* v. *Anderson, et al* * * * set forth at page 14552 of the Daily Congressional Record of August 27, 1947". 103 Cong. Rec.—Part 12, 16737, 16738.

The statement of Judge Moore made prior to the enactment of 18 U.S.C. § 3500 indicates the desirability of making statements available when they contain the *substance* of

the witness' remarks and the undesirability of making them available when they consist only of the *subjective impressions, opinions or conclusions* of the person making such notes or reports. 103 Cong. Rec.—Part 12, 15940.

After 18 U.S.C. § 3500 was enacted the words "substantially verbatim recital" were construed in *United States* v. *Waldman*, 159 F. Supp. 747, (D.C. N.J., 1958). It was there stated, p. 749:

> "Of course, by the 'substantially verbatim recital', 'verbatim' is not meant. It need not be word for word. It need not use exactly the words of [the witness], nor must [the witness] words be used in their exact grammatical phrasing. That would prevent the use of any narrative statement. *What is meant is, that the statement should give the substance of what [the witness] said;* should give it, so far as the *substance* is concerned, substantially in [the witness'] words. A reading of the statement here in question clearly shows that is exactly what the statement does. *It equally clearly shows that the facts there stated are not the mere 'comments' or 'ideas' of the agent.*" (Emphasis supplied.)

There is nothing in the opinion below to indicate that the Carlin memorandum did not contain the substance of his interview with Balaban. In fact, the failure to assert irrelevancy indicates the exact contrary. Further, the court below did not take the position that it contained impressions and conclusions of the person making it.

Finally, as heretofore argued, *Jencks* permits this discovery under the circumstances here. Legislative history pertaining to 18 U.S.C. § 3500 indicates that it was designed not to nullify but to clarify *Jencks*. S. Reps. 569, 981, 85th Cong., 1st Sess. 2 (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); 103 Cong. Rec.—Part 12, 15785. If this be the case, the Carlin statement must indeed be discoverable under 18 U.S.C. § 3500.

III.

AN IN CAMERA EXAMINATION OF A SEALED STATEMENT OR REPORT NOT CLAIMED TO BE IRRELEVANT AND RELATED AFFIDAVITS DEHORS THE RECORD IS NOT AUTHORIZED AND DEPRIVES PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

In arriving at its decision the court below utilized procedure which is virtually without precedent in courts of review. No statement or report of Carlin was made part of the authenticated and certified record on appeal. No such statement or report was ever exhibited to the trial court. Nevertheless, the court below considered *in camera* the contents of a sealed envelope furnished it by the prosecutor. Petitioner has never seen this document. **Compounding this peculiar and unorthodox procedure, the court below also considered two affidavits dehors the record also furnished it by the prosecutor** (R. 75-78, 85).

The extraordinary and irregular character of this procedure is ironically highlighted by a recent decision of the court below in *United States* v. *Miller*, 248 F. 2d 163 (1957). In that case the court demonstrated zeal in staying within the confines of the certified record when an excursion outside of it, as the court made here, might well have produced the reversal of a conviction. It refused to examine a witness's statement (also in a sealed envelope) found by the trial court, at a time prior to this Court's decision in *Jencks*, to be not only consistent with, but to contain matters unrelated to the witness's testimony. Holding that the trial court erred in failing to furnish the statement to the accused after excising portions of it, the court below stated (p. 165):

> "* * * but we cannot determine whether or not it was prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The procedure of the court below in the case at bar is improper not only because it ignores time-honored rules for preserving the authenticity and integrity of litigated issues, but also because it violates the very standards of fairness and justice which prompted this Court's decision in *Jencks*.

Jencks, of course, establishes that the determination of whether an earlier statement or report of a government witness is suitable for cross-examination or impeachment should be made by defense counsel and not by the trial judge. Only the defense counsel has sufficient familiarity with his case to make this decision. 18 U.S.C. § 3500 permits an *in camera* examination of certain defined statements by the trial court and then only when a claim is made by the government that it contains matter which does not relate to the subject matter of the testimony of the witness. No such claim is made here; hence, there is no statutory authority for an *in camera* examination by the trial court or the court below. Where, as here, the claim is made, not that the statement contains extraneous matter, but that it is not discoverable at all, the question should be resolved, as are all other matters of discovery, by the trial court openly, with full right to a defendant to make all proper inquiry and argument. *Cf. United States* v. *Waldman*, 159 F. Supp. 747 (D.C. N.J., 1958).

The arrogation to itself by the court below without statutory authority of the right to make such a determination

secretly and upon self-serving affidavits without affording petitioner the right to cross examine deprives him of his rights under both the 5th and 6th Amendments to the Constitution. *Alford* v. *United States*, 282 U.S. 687 (1931); *United States* v. *Douglas*, 155 F.2d 894 (C.A. 7, 1946); *Lindsey* v. *United States*, 133 F.2d 368 (C.A. D.C., 1942).

IV.

18 U.S.C. § 3500 IS UNCONSTITUTIONAL IN THAT IT IS IN CONTRAVENTION OF ARTICLE III AND THE FIFTH AMENDMENT OF THE CONSTITUTION.

Implicit in the questions here raised is the question of whether 18 U.S.C. § 3500 is constitutional at all.[1] If it is not, the lower court's reliance on that statute is unjustified and according to its own concession the Carlin statement would be discoverable under *Jencks*.

As has been seen, 18 U.S.C. § 3500 permits *in camera* examination of the statements defined by it in Par. (e) when the government makes the claim that such statements contain matter which does not relate to the subject matter of the witness' testimony.

Prior to the enactment of the statute, this Court held in *Jencks* v. *United States*, 353 U. S. 657 (1957) that such statements were producible in the first instance to the defense. It reasoned that "Justice requires no less" since "only the defense is adequately equipped to determine the effective use of such statements and reports for the purpose of discrediting the Government's witness * * *" 353 U. S. at 668, 669. Of course, only this Court can determine whether it meant due process by its use of the word "jus-

[1] Constitutional questions are directly raised in related cases assigned for argument immediately hereafter.

tice". If it did, obviously the statute contravenes the Fifth Amendment to the Constitution.

It is submitted that this Court was in fact referring to due process because involved here are a defendant's right to the effective assistance of counsel. The *in camera* examination provisions of the statute effectively deprive him of that right by preventing counsel from arguing relevancy either in the discovery or evidentiary sense. This is true whether the question arises at the trial or appellate level. This constitutional infirmity was recognized in both the Senate and House. 103 Cong. Rec.-Part 12, 15790, 16738.

It further appears that the statute violates the Constitution in still another respect. Under Article III of the Constitution the judicial power has been vested in this Court and quite obviously that power includes the power to make rules of procedure. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816).

Under the principles of separation of power no authority exists for Congress to make such rules and that it has done so in the past cannot create the power where it does not constitutionally exist. Therefore to the extent that 18 U. S. C. § 3500 abrogates, repeals or nullifies the Federal Rules of Criminal Procedure promulgated by this Court the Statute is unconstitutional.[1]

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[1] This argument is enlarged upon by Prof. Arthur John Keefe in 7 Catholic University Law Review 91, 108-112. (1958).

CONCLUSION.

The decision below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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